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No. 33678-2-II

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IN THE  
COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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FILED  
COURT OF APPEALS  
DIVISION II  
08 JAN 31 PM 1:20  
STATE OF WASHINGTON  
BY *[Signature]* DEPUTY

STATE OF WASHINGTON,  
Respondent,

v.

GUY DANIEL TURNER,  
Appellant.

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**APPELLANT'S SUPPLEMENTAL BRIEF**

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### **A. STATEMENT OF THE ISSUE**

How does the Supreme Court's decision in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), wherein the Court held that the proper remedy for a double jeopardy violation is dismissal of the lesser conviction, affect the issues in the instant case?

### **B. STATEMENT OF THE CASE**

Appellant, Mr. Guy Daniel Turner, was convicted after jury trial of Assault in the Second Degree and Robbery in the First Degree. Mr. Turner moved to have the assault conviction merge with the robbery conviction. The trial court granted the motion, vacating the assault conviction for purposes of sentencing. CP at 16-17. However, it ruled that "the conviction for Assault in the Second Degree was nevertheless a valid conviction, and the defendant could be sentenced on it, if, on appeal, the conviction for Robbery in the First Degree is vacated or otherwise set aside." CP at 16-17.

Mr. Turner appealed to this Court, asking, *inter alia*, that the assault conviction be vacated. A commissioner ruled against him and this Court later denied his motion to modify the commissioner's ruling.

Mr. Turner then filed a *pro se* petition for Supreme Court review. The Supreme Court remanded the case to this Court for reconsideration in light of its

decision in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). By order dated January 2, 2008, this Court directed counsel to explain how Womac affects the issues in the instant case.

### C. ARGUMENT

**The Trial Court's Decision, Vacating Mr. Turner's Assault Conviction for Purposes of Sentencing, but Leaving it in Reserve in Case the Other Conviction is Successfully Attacked, Directly Conflicts with State v. Womac and this Court Should Vacate the Conviction**

The trial court's decision not to vacate Mr. Turner's assault conviction. In Womac, the defendant was convicted of three related charges: homicide by abuse, felony murder in the second degree, and assault of a child in the first degree. Womac, 160 Wn.2d 643, 647-48. The defendant moved to have the second two convictions vacated on double jeopardy grounds. The trial court determined double jeopardy did not require dismissal of these counts, leaving both convictions on the defendant's record. This Court directed the trial court to "conditionally dismiss Counts II and III," allowing for reinstatement should Count I later be reversed, vacated, or otherwise set aside. 160 Wn.2d at 648-49. The Supreme Court reversed, holding that the remedy for a double jeopardy violation is dismissal. 160 Wn.2d at 651.

In its opinion, the Supreme Court deplored exactly what the trial did in this case: finding a double jeopardy violation and nevertheless holding the unlawful

conviction “in a safe for a rainy day, in the event that the [surviving charge] gets reversed.” 160 Wn.2d at 651 (internal quotation marks omitted). The Court explained the problem with this practice:

To permit such a practice allows the State multiple bites at the apple by labeling one crime by three different names and upholding any and all resulting convictions. And the State, “with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”

160 Wn.2d at 651, *quoting*, Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

Given the unequivocal message of Womac, the only way this Court could find that Mr. Turner’s assault conviction should not be vacated is if merger of convictions to avoid double punishment for the same conduct is somehow different from a double jeopardy analysis. But no difference exists. As the Supreme Court declared in State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995): “There are no non-double jeopardy reasons for reviewing multiple punishments -- rather, the foundation for such review is the constitutional prohibition against double jeopardy.”

The Double Jeopardy Clauses of both the federal and Washington constitutions encompass three separate constitutional protections, including that a defendant not receive multiple punishments for the same offense:

“Both prohibit ‘(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) *multiple punishments*.’” Womac, 160 Wn.2d 643, 650-51, *quoting In re Pers. Restraint of Percer*, 150 Wn.2d 41, 48-49, 75 P.3d 488 (2003) (emphasis added). Thus, the merger of a conviction to avoid double punishment for the same conduct is actually part of the double jeopardy analysis. *See State v. Frohs*, 83 Wn. App. 803, 811, 924 P.2d 384 (1996) (“the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guaranty against double jeopardy; i.e., whether the legislative branch, acting within its own constitutional limitations, has authorized cumulative punishments”).

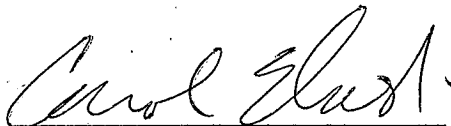
Accordingly, when the trial court properly merged the second degree assault conviction with the first degree robbery conviction, the appropriate remedy was simply vacation of the assault conviction. The trial court’s order attempting to preserve the assault conviction for future use was erroneous and should be vacated.

#### D. CONCLUSION

For all of these reasons, Guy Daniel Turner respectfully requests this Court to order that his Assault in the Second Degree conviction be vacated.

Dated this 30th day of January, 2008.

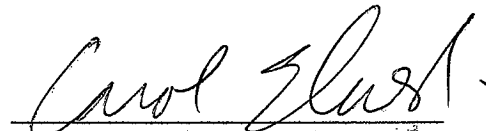
Respectfully submitted,



Carol Elewski, WSBA # 33647  
Attorney for Appellant

#### CERTIFICATE OF SERVICE

I certify that on this 30th day of January, 2008, I mailed one copy of the attached brief, postage prepaid, to the attorney for the Respondent, Todd A. Campbell, Deputy Prosecuting Attorney, 930 Tacoma Avenue South, Tacoma, Washington, 98402-2102, and one copy of the brief, postage prepaid, to Mr. Guy Daniel Turner, DOC No. 866562, MCC/MSU - D-107-A, Monroe Corrections Complex, Twin River Unit, P.O. Box 888, Monroe, WA 98272-0888.

  
Carol Elewski, WSBA # 33647

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